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STEPHEN MANGELSEN

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FLUKE ELECTRONICS CORPORATION, a Washington corporation,

Plaintiff,

vs.

STEPHEN MANGELSEN, a California resident,

Defendant.

AND RELATED COUNTER CLAIM.

NO. C0-8-01188 JW

STEPHEN MANGELSEN'S, OPPOSITION TO FLUKE ELECTRONICS CORPORATION'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED (RULE 12(b)(6))

Date: September 15, 2008
Time: 9:00 a.m.
Dept: 8
Judge: Hon. James Ware

I. INTRODUCTION

Defendant and Cross-Complainant STEPHEN MANGELSEN ("Mangelsen") opposes Plaintiff and Cross-Defendant's, FLUKE ELECTRONICS CORPORATION ("Fluke") Motion to Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted, as follows:

II. ARGUMENT

Fluke's motion, consisting of approximately one page of argument, is based entirely on its unsupported factual assertions contradicting the factual allegations of the Cross-Complaint. This is not a proper basis for a motion to dismiss. The motion should be denied.

A. A Motion to Dismiss Is Liberally Construed in the Complainant's Favor

In analyzing a motion to dismiss for failure to state a claim upon which relief can be granted, the court must accept as true all material allegations in the complaint. *Pareto v. F.D.I.C.* (9th Cir. 1998) 139 F.3d 696, 699. The court must assume that all general allegations "embrace whatever specific facts might be necessary to support them." *Peloza v. Capistrano Unified School Dist.* (9th Cir. 1994) 37 F.3d 517, 521. When a complaint's allegations are capable of more than one inference, the court must adopt whichever inference supports a valid claim. *Columbia Natural Resources, Inc. v. Tatum* (6th Cir. 1995) 58 F.3d 1101, 1109.

The question of the complainant's ability to prove his or her allegations, or possible difficulties in making such proof, is generally of no concern in ruling on a Rule 12(b)(6) motion. *Allison v. California Adult Authority* (9th Cir. 1969) 419 F.2d 822, 823.

B. Mangelsen's First Cause of Action States a Claim upon Which Relief Can Be Granted

Fluke cites the Settlement Agreement and an apparently contemporaneous letter (neither of which are authenticated) as "evidence" that the monies in the escrow account, a portion of which should have been distributed to Mangelsen pursuant to the terms of the Merger Agreement (Cross-Complaint, ¶6), have been exhausted such that no accounting is necessary.

The First Cause of Action incorporates common counts for money received (money Fluke improperly removed from the escrow account without Mangelsen's consent or knowledge) and an accounting (to establish the nature and extent of such withdrawals). Even assuming *arguendo* that Fluke's factual assertions regarding the "credit" of the monies in the escrow account are correct, $315,660 was apparently previously distributed to Fluke from the escrow account prior to execution of the Settlement Agreement. Taking the material factual allegations of the Cross-Complaint as true, as is required on a Rule 12(b)(6) motion, there remains *at least* $315,660 to be accounted for. *Pareto*, *supra*, 139 F.3d at 699.

Further, the First Cause of Action incorporates Mangelsen's allegations that the Merger Agreement required the monies in the escrow account to be distributed to the Common

Equityholders over a period of time, ending in March, 2004, (¶6) and that Mangelsen did not know about or consent to the Settlement Agreement, thus raising the issue of Fluke's entitlement to the monies in the escrow account. Fluke does not contradict these allegations, and the court is required to accept them as true for purposes of this motion.

Accordingly, relief may be properly granted as to Mangelsen's First Cause of Action. The motion should be denied.

C. Mangelsen's Second Cause of Action States a Claim upon Which Relief Can Be Granted

The allegations of the Second Cause of Action are straightforward. Mangelsen alleges at Paragraph 6 of the Cross-Complaint (which is incorporated into the Second Cause of Action by reference) that Fluke was required, pursuant to the Merger Agreement, to agree to periodic distributions of the funds in the escrow account to the Common Equityholders, of whom Mangelsen was a member, and that the funds not used were to be fully distributed by March 31, 2004. At Paragraph 23, Mangelsen alleges that Fluke breached the Merger Agreement by failing to consent to such distributions.

To the extent that Fluke suggests that the "credit" of the remaining funds in the escrow account to the Common Equityholders in the Settlement Agreement constitutes a "distribution" to the Common Equityholders, there are two significant flaws with this position.

First, Fluke ignores the fact that its breach is alleged to have arisen in its failure to consent to the distributions contemplated by the Merger Agreement, a breach which continued up to and through execution of the Settlement Agreement. Again, taking the allegations of the Cross-Complaint as true, relief can clearly be granted as to this allegation and thus the motion is improper.

Second, Fluke misreads the thrust of Mangelsen's claims: that Mangelsen neither knew about nor approved the Settlement Agreement between Fluke and other equityholders which purported to bind Mangelsen to pay Fluke $388,000. Since Mangelsen did not approve the Settlement Agreement, he can hardly be said to have *received* a "distribution" in the form of a "credit" to the amount he was deemed to "owe" Fluke under the Agreement. Mangelsen

is entitled to put on proof that Fluke's actions breached the Merger Agreement.

The motion should be denied.

III. CONCLUSION

For all of the foregoing reasons, Fluke's motion to dismiss should be denied. In the event that the Court is inclined to grant the motion, Mangelsen requests leave to amend the Cross-Complaint.

Dated: August 25, 2008

MORGAN, FRANICH, FREDKIN & MARSH

By _____
DONN WASLIF
Attorneys for Defendant and Counter-Claimant, STEPHEN MANGELSEN

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CERTIFICATE OF SERVICE BY MAIL

I, the undersigned, hereby certify that I am over the age of eighteen years and not a party to the within action. My business address is 99 Almaden Boulevard, Suite 1000, San Jose, California 95113-1606.

On the date indicated below, I served by mail a true copy of the following document:

STEPHEN MANGELSEN'S, OPPOSITION TO FLUKE ELECTRONICS CORPORATION'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED (RULE 12(b)(6))

I am readily familiar with the practice of this business for collection and processing of documents for mailing with the United States Postal Service. Documents so collected and processed are placed for collection and deposit with the United States Postal Service that same

day in the ordinary course of business. The above-referenced document(s) were placed in (a) sealed envelope(s) with postage thereon fully prepaid, addressed to each of the below listed parties and such envelope(s) was (were) placed for collection and deposit with the United States Postal Service on the date listed below at San Jose, California.

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Executed on **August 25, 2008**, at San Jose, California. I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

DONNA OLSON